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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, by its DIVISION OF MARINE FISHERIES, and, STATE OF NEW HAMPSHIRE, by its FISH & GAME DEPARTMENT, DIVISION OF MARINE FISHERIES, Plaintiffs, v. CARLOS M. GUTIERREZ, *et al.*, Defendants.	Case No. 06-cv-12110 (EFH) **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Having delayed in prosecuting their case for over one year, Plaintiffs now claim that time is of the essence. They ask this Court to ignore the fact that the New England Fishery Management Council ("Council") is presently considering new data and new measures which would render moot their claims regarding the challenged agency action, Framework Adjustment 42 ("Framework 42") to the Northeast Multispecies Fishery Management Plan ("FMP"). Although Plaintiffs' claims relate to only one limited portion of Framework 42 – the computation of days-at-sea ("DAS") in the Gulf of Maine – Plaintiffs would have the Court vacate the entire suite of management measures and reinstate the prior measures, which Federal Defendants found were inadequate to achieve rebuilding goals. The Court should decline to order the relief requested by Plaintiffs not only because it is inappropriate in light of the measures already under consideration by the Council, but also because Plaintiffs have wholly failed to meet their burden to prove that the challenged framework adjustment violates applicable law. The administrative record reflects that the National Marine Fisheries Service's ("NMFS") decision to approve Framework 42 is "'within the bounds of reasoned decisionmaking,'" and therefore the Court "may not set it aside, regardless of whether [it would] have reached an opposite decision." M/V Cape Ann v. United States, 199 F.3d 61, 63-64 (1st Cir. 1999). See also Conservation Law Found. v. Evans, 360 F.3d 21, 27-28 (1st Cir. 2004) (to succeed on substantive challenge to an FMP, plaintiffs "must demonstrate that NMFS lacked a rational basis for adopting the framework;" it is not the court's role to second-guess NMFS' determinations). Plaintiffs have failed to rebut Federal Defendants' showing that NMFS had a rational basis for its decision to adopt Framework 42, and that Federal Defendants are entitled to summary judgment on Plaintiffs' claims.

ARGUMENT

I. FEDERAL DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM UNDER NATIONAL STANDARD ONE BECAUSE PLAINTIFFS HAVE FAILED TO PROVE THAT FEDERAL DEFENDANTS' DECISION TO APPROVE FRAMEWORK 42 LACKS A RATIONAL BASIS.

Plaintiffs continue to maintain that NMFS must consider an exception set forth in the National Standards Guidelines ("Guidelines"), despite the unambiguous language of the Magnuson-Stevens Act providing that the Guidelines are not binding. See 16 U.S.C. § 1851(b). While the National Standards are "statutory principles that must be followed in any FMP," the Guidelines are merely "aids to decisionmaking. . . ." 50 C.F.R. § 600.305(a)(3). Plaintiffs cannot state a claim based on failure to consider the mixed-stock exception because any decision to apply the exception is at the sole discretion of the Council and the Secretary. Further, even assuming that Plaintiffs' view of the Guidelines is correct, their claim must fail as a factual matter because the record reflects that NMFS did not ignore the mixed-stock exception in the present case.

A. Plaintiffs Have No Cause Of Action Based On The National Standards Guidelines.

Plaintiffs' argument that the Secretary is required to consider the mixed-stock exception is contrary to the plain language of the Magnuson-Stevens Act. Plaintiffs appear to back down from the position espoused in their opening brief that there is a "non-discretionary requirement" that the Secretary consider the mixed-stock exception. See Pl. Mem. at 18. But they continue to advance the argument that the Guidelines are not "optional," see Pl. Opp. at 8, although the language of the Magnuson-Stevens Act and the Guidelines themselves reflects that they are precisely that.

Ignoring the fact that the statute, regulations, and case law clearly reflect that the Guidelines are merely "advisory," see Def. Mem. at 15-16, Plaintiffs cite cases from other district courts construing unrelated guidelines and policies for the proposition that such guidelines "must be adhered to and cannot be ignored." Pl. Opp. at 8-9. Those cases are not binding on this Court, and are distinguishable from the present case. In Pauite Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972), the agency did not merely ignore its own "guidelines and regulations," but it failed to take into account district court orders governing water use. In Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993), the agency deviated from its regulations by failing to consider enumerated factors in exercising its discretion. Unlike the Guidelines, the regulation at issue in Haitian Centers, 8 C.F.R. § 212.5, does not state that it is intended merely as an "aid[ ]to decisionmaking." See 50 C.F.R. § 600.305(a)(3). In Lobsters, Inc. v. Evans, 346 F. Supp. 2d 340 (D. Mass. 2004), the court found that NOAA had disregarded a policy stating that the agency would, for purposes of considering prior violations, only include offenses occurring within the prior five years. Unlike the memorandum at issue in Lobsters, Inc., the Guidelines themselves state that they are advisory. Moreover, none of the cases cited by Plaintiffs involved guidelines or policies that, by statute, "shall not have the force and effect of law." 16 U.S.C. § 1851(b).

Nor does Tutein v. Daley, 43 F. Supp. 2d 113 (D. Mass. 1999), support Plaintiffs' position. Plaintiffs correctly note that "a party is not entitled to challenge the guidelines on the same basis as it would challenge regulations." Pl. Opp. at 9. It is the basis for that holding which is relevant here. The Guidelines are not reviewable as "regulations" because they do not have the force and effect of law. Tutein, 43 F. Supp. 2d at 122. Nor is there a private right of

action under the APA based on the Guidelines, because they "have no effect. . . ." Id. at 124. Because the Guidelines have no binding effect, Plaintiffs may not challenge a decision by the Secretary on the basis that it fails to apply a provision of the Guidelines.

B. The Secretary Rationally Determined That It Was Not Appropriate To Apply The Mixed-Stock Exception In The Context Of Framework 42.

It is clearly the Council's responsibility to consider whether to apply the mixed-stock exception. See 50 C.F.R. § 600.310(d)(6) ("[a] Council may decide to permit this type of overfishing. . . .") (emphasis added). This is fully consistent with the Magnuson-Stevens Act, which gives the Council primary responsibility for drafting FMPs and amendments, with oversight by the Secretary. Like FMPs and FMP amendments, NMFS may only concur or not concur in framework adjustments, thereby eliminating NMFS' authority to substantively alter a framework adjustment once submitted by the Council. See 16 U.S.C. § 1854(a)(3) (NMFS may only approve, disapprove or partially disapprove a plan amendment); A.R. 8494 (in implementing a framework adjustment "NMFS may only approve or disapprove substantive measures, and, may not unilaterally modify any measure in a substantive way pursuant to section 304(a)(3) to [*sic*] the Magnuson-Stevens Act"). Plaintiffs' view that the Secretary is "obligated to implement his own" plan if the plan proposed by the Council "does not meet with [his] approval" is contrary to the express language of the Magnuson-Stevens Act. See Pl. Opp. at 11. The Secretary may only prepare his own plan or plan amendment if: (a) the Council fails to develop and submit a necessary amendment; (b) the Secretary disapproves or partially approves an amendment, and the Council fails to submit a revised amendment; or (c) the Magnuson-Stevens Act expressly grants to the Secretary authority to prepare a plan amendment (as is the case with Atlantic Highly Migratory Species). See 16 U.S.C. § 1854(c)(1) (emphasis added). This furthers Congress' intent that FMPs be developed by councils, which include federal, state and territorial fishery management officials, participants in commercial and recreational fisheries, and other individuals with scientific experience or training in fishery conservation and

management. See id. § 1852(b). See also Commonwealth of Mass. ex rel. Div. of Marine Fisheries v. Daley, 170 F.3d 23, 27-28 (1st Cir. 1999) ("The [MSA's] main thrust is to conserve the fisheries as a continuing resource through a mixed federal-state regime; the [fishery management plans] are proposed by state Councils but the final regulations are promulgated by the Secretary through the Fisheries Service.").

NMFS did not "ignore" the mixed-stock exception in this case. Contra Pl. Opp. at 9. The issue of the mixed-stock exception was raised before the Council as it was developing Framework 42, but "it was not seriously considered and not analyzed, given the time constraints necessary to complete [Framework] 42 and uncertainty that the necessary criteria could be met." A.R. 8507. NMFS addressed the exception in its final rule, reasonably concluding that application of the exception would not be appropriate where: (a) commenters provided no analysis demonstrating that the criteria for application of the exception were satisfied; and (b) the exception could not be applied in the context of a framework adjustment, but would require an amendment to the FMP. Id. Plaintiffs' only attempt to counter this conclusion is to assert that "not seriously considered" equates to "not considered." In the absence of any statutory or case law supporting this interpretation, Plaintiffs' argument must fail.

As a factual matter, it was not necessary to invoke the mixed-stock exception in this case. Plaintiffs fail to counter Federal Defendants' showing that the management measures in Amendment 13 established the functional equivalent of the mixed-stock exception. See Def. Mem. at 18-19. The phased-in approach adopted by the Council in Amendment 13 permits overfishing to occur on certain stocks at the outset of the rebuilding plan, but gradually decreases the rate to end overfishing to allow rebuilding targets to be met. See Oceana, Inc. v. Evans, No. 04-0811 (ESH), 2005 WL 555416, at *12-13 (D.D.C. March 9, 2005). Because this achieves the

same benefit for fishermen that the mixed-stock exception would provide, Plaintiffs cannot claim to have been harmed by the fact that the mixed-stock exception was not applied in Framework 42.

II. PLAINTIFFS' CLAIM UNDER NATIONAL STANDARD TWO MUST FAIL BECAUSE PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN TO PROVE THAT THE CLOSED AREA MODEL IS NOT THE BEST SCIENTIFIC INFORMATION AVAILABLE.

Plaintiffs' claim under National Standard Two fails to state a valid claim because there is no requirement in the Magnuson-Stevens Act that NMFS release particular information to the public supporting a model used by the agency, especially in the absence of any evidence or even an allegation that NMFS erred in using the Revised CAM in analyzing the effectiveness and impact of the management measures. Moreover, even if Plaintiffs' allegations constitute a valid claim, it is based on the false presumption that there was insufficient information to evaluate the model.

Nothing in the Magnuson-Stevens Act specifies the level of detail that NMFS must provide to the public regarding a model used to evaluate data in the context of a rulemaking. Plaintiffs allege that Federal Defendants did not comply with "regulatory requirements" for using and making available the best scientific information. See Pl. Opp. at 18. But they cite no such "requirements." Plaintiffs base this claim solely on the Guidelines, which are not binding. See Pl. Opp. at 18-19 (citing 50 C.F.R. § 600.315(b)(1), (b)(2)). See also supra Section I.A.; Def. Mem. at 15-17, 23. Further, Plaintiffs continue to rely on their flawed reading of the phrase "timely availability" in 50 C.F.R. § 600.315(b)(1). This language addresses the data that the Council and NMFS should consider, not the dissemination of information to the public. See Def. Mem. at 23-24.

Plaintiffs attempt to distinguish this case from Oregon Trollers Ass'n v. Gutierrez, 452 F.3d 1104 (9th Cir. 2006), arguing that here the Secretary failed to provide "basic scientific information regarding the Revised CAM." Pl. Opp. at 17. In Oregon Trollers, the court upheld NMFS' decision on the basis of an arguably incomplete administrative record. See Oregon Trollers, 452 F.3d at 1120 (although NMFS did not file the "relevant administrative record" – the record compiled in 1989 to support the FMP amendment – the record filed to support the challenged management measures "contain[ed] enough excerpts of that record to allow [the court] to defer to the agency's decisionmaking"). The Ninth Circuit relied on the absence of evidence in the record showing that the council's studies were "outdated or flawed" and the plaintiffs' failure to point to any scientific evidence inconsistent with NMFS' decision in rejecting the plaintiffs' claim under National Standard Two. Id. at 1119-1120. Here, as in Oregon Trollers, Plaintiffs cite no inconsistent scientific evidence, but rely solely on an alleged absence of information in the administrative record.

Nor can Plaintiffs distinguish Oceana, Inc. v. Evans, 2005 WL 555416, on the basis that in that case the court undertook a "careful review of the assumptions built into the model and the model's accuracy in predicting fishing mortality." Pl. Opp. at 15. In Oceana, the court first noted that plaintiffs had failed to propose an alternative model, see Oceana at *16, and then considered the record evidence regarding the purpose of the model and the assumptions implicit in the model. Id. at *19-20. Here the Court has before it similar information regarding the Revised CAM. See A.R. 8043-8056 (explaining assumptions in model and attaching draft document containing mathematical formula); Suppl. A.R. Doc. 200 at I-225-226 (explaining advantages and weaknesses of model). The administrative record also contains data, released

shortly after the final rule was issued, which is sufficient to permit third parties to replicate the model. See Suppl. A.R. Docs. 206-211. Thus, the record is adequate to permit the Court to evaluate the Revised CAM and uphold NMFS' determination that it constitutes the best available scientific model for predicting vessel behavior.

Even assuming that Plaintiffs have stated a valid claim under National Standard 2, Plaintiffs have failed to support their contention that there was insufficient information to permit Plaintiffs to evaluate the Revised CAM. Plaintiffs ignore the fact that NMFS provided the mathematical formula for the model on July 20, 2006, see A.R. 8046-56, dismissing this document because it was marked as a "draft." See Pl. Opp. at 15 n.6. Plaintiffs cite no authority for the proposition that the Court should disregard a document merely because it is designated a draft. Further, Plaintiffs' claim that NMFS failed to release sufficient data regarding the Revised CAM is contradicted by the fact that the Massachusetts Division of Marine Fisheries, through its Marine Fisheries Institute, was able to offer a critique of the model. See Suppl. A.R. Doc. 212 (addressing criticisms raised by Marine Fisheries Institute). Although most of the issues raised by the Marine Fisheries Institute had already been discussed by the Plan Development Team (composed of Council and NMFS staff and other technical experts), NMFS provided a detailed response to their critique. See id.[1] Finally, although NMFS disclosed additional data after the final rule was issued, see Suppl. A.R. Docs. 206-211, Plaintiffs still have not identified any specific flaws with the model, other than the criticisms already considered by NMFS.

[1] NMFS' response cites a "presentation to the Amendment 13 peer review panel" regarding the CAM, which was provided to Massachusetts' Marine Fisheries Institute and was also publicly available on the website of the Northeast Fisheries Science Center. See Suppl. A.R. Doc 212 at 3; see also http://www.nefsc.noaa.gov/groundfish/session5c1.pdf (attached hereto as Exhibit 1). This presentation explains the model, including the mathematical formula on which it is based. See id. at 12-13.

Even if Plaintiffs were correct that NMFS failed to provide sufficient information about the Revised CAM, that alone is insufficient to establish that the model does not constitute the best available scientific information. Plaintiffs speculate that "perhaps [the mathematical formula and aggregate data were] not available during the development and promulgation of Framework 42. . . ." Pl. Opp. at 16. Plaintiffs' assumption that NMFS either: (a) did not have the information; or (b) withheld it in a "manipulate[ive]" manner ignores the reality that NMFS was not required to disclose additional information regarding the basis for the model.

Whether there is enough information in the record to permit review of the Revised CAM is for the Court, not Plaintiffs, to decide. Plaintiffs reassert in their motion for summary judgment the argument that the Court rejected in the context of their motion to supplement the administrative record: that there is insufficient information in the administrative record to permit the Court to evaluate the Revised CAM. See June 13, 2007 Order denying Plaintiffs' Motion to Compel; State Plaintiffs' Motion to Compel Federal Regulators to Supplement the Administrative Record (May 1, 2007), Doc. No. 14, at 5 ("[T]he Administrative Record filed by the defendants in this action, while voluminous, contains insufficient detail about the CAM (and the assumptions upon which it rests) to permit plaintiffs to critique and explain it, or to allow this Court (as it must) to evaluate it."); Pl. Opp. at 14 ("Thus, even considering both the Administrative Record and the Federal Defendants' Combined Memorandum, the validity of the Revised CAM cannot be resolved by this Court."). This argument is no more persuasive now than it was in the context of Plaintiffs' motion to supplement the record.

If the Court were to find that the administrative record is insufficient to determine whether the Revised CAM constitutes the best available science, the proper remedy would be to

remand to NMFS for additional explanation. See Def. Mem. at 27. However, in this case remand is not warranted because there is sufficient information in the administrative record to permit the Court to determine that NMFS used the best available scientific information. The Revised CAM was the best available model to predict the behavior of fishermen in response to the management measures contained in Framework 42. The CAM underwent two stages of review. First, the model was reviewed and endorsed by the Council's Social Sciences Advisory Committee in 2001. See A.R. 8504. The model was subjected to further review by a panel of independent experts and modified in response to their comments. See id. See also Suppl. A.R. Doc. 205 at V-3. The modified model, the Revised CAM, represents the best available scientific model for predicting vessel behavior. See A.R. 8505. NMFS considered a variety of public comments questioning the assumptions underlying the Revised CAM and determined that the criticisms were inaccurate. See A.R. 8504-8505; See also Def. Mem. at 25-26. Significantly, there is no evidence in the administrative record reflecting that the Council members from Massachusetts and New Hampshire objected to the use of the Revised CAM in Framework 42.[2]

NMFS reasonably determined that the analysis conducted using the Revised CAM represents the best scientific information available, and the agency's decision is entitled to deference. Plaintiffs' claim under National Standard Two must fail because they have not proven that NMFS lacked a rational basis for relying on the Revised CAM, nor have they met their burden to propose an alternative model that NMFS should have used. See Def. Mem. at 21-23. See also Massachusetts, 170 F.3d at 30 ("If no one proposed anything better, then what is

[2] The New Hampshire representative (Ms. McBane) voted in favor of sending Framework 42 to NMFS for approval, while the Massachusetts representative (Mr. Pierce) voted against it. See A.R. 5588.

available is the best."). Thus, Federal Defendants are entitled to summary judgment on Plaintiffs' third claim for relief.

III. VACATING AND REMANDING FRAMEWORK 42 WOULD BE FUTILE AND COULD RESULT IN HARM TO THE FISHERY.

Granting Plaintiffs' requested relief – vacating and remanding Framework 42 while reinstating the prior regulation, Amendment 13 – would be futile in light of the actions that the Council is already taking, and would likely result in harm to the fishery. Thus, even if the Court finds that Plaintiffs have met their burden to prove that Framework 42 is arbitrary and capricious, it should decline to vacate the framework or remand to NMFS for reconsideration.

A. Remanding Framework 42 Is Unnecessary Where The Council Is Already Reconsidering The Management Measures In The Context Of Adopting A New Amendment To The Fishery Management Plan.

Where an agency action is unsupported by the administrative record, a reviewing court "should ordinarily remand to the agency rather than compensating for the agency's oversight by launching a free-wheeling judicial inquiry into the merits." Rhode Island Higher Educ. Assistance Auth. v. Secretary U.S. Dep't of Educ., 929 F.2d 844, 857 (1st Cir. 1991). However, in this case remand would be futile because the Council is already reconsidering the differential DAS scheme in the context of Amendment 16 to the FMP based on an assessment of new data regarding the status of groundfish stocks. See Def. Mem. at 29-30.

Plaintiffs do not dispute that, if the Court were to remand the final rule to NMFS, the agency would be statutorily required to permit the Council to reconsider Framework 42 in the first instance. See id. at 29, citing 16 U.S.C. § 1854(a). Here it would be pointless for the Council to reconsider Framework 42, which was based on data that is now outdated, where it is developing new management measures through Amendment 16 based on new data and stock

assessments. Plaintiffs argue that Framework 42 contains unspecified "errors" that will be carried forward into Amendment 16. See Pl. Opp. at 5. To the extent Plaintiffs believe that there are particular errors in the analysis of Framework 42 that call into question the existing management measures, they may raise their concerns during the public comment process for Amendment 16. With respect to the CAM, Plaintiffs have not identified any alleged errors in the model's methodology that were not already considered by NMFS. Rather, Plaintiffs' claim is based on general allegations that the Secretary should have provided additional information to interested parties. To the extent Plaintiffs have specific proposals for how the model can be improved, they can raise such comments in the context of the new rulemaking.

Nor do Plaintiffs dispute that their challenge to Framework 42 will be moot upon issuance of the final rule adopting Amendment 16. See Pl. Opp. at 7 ("Once a Framework or Amendment is replaced, it cannot be challenged."). Although Plaintiffs' claims challenging Framework 42 are not presently moot, the Court should decline to order the requested relief because it is unnecessary where the Council has already made significant progress toward issuing a new regulation. The Council is expected to finalize Amendment 16 by February 2009 and submit it to NMFS for review in March or April 2009. See Def. Mem. at 29-30. Plaintiffs' argument that "time is of the essence" and that economic harm to fishermen weighs against leaving Framework 42 in place while the Council and NMFS consider Amendment 16 is belied by their delay in prosecuting this case. See Pl. Opp. at 6. Having delayed for nearly one year before filing their motion for summary judgment, Plaintiffs cannot reasonably argue that they would suffer extreme harm if judicial review of the DAS scheme were postponed until after the issuance of Amendment 16.

B. The Court Should Decline To Vacate Framework 42 Or Reinstate Amendment 13 Because It Would Result In Harm To The Fishery.

Even if the Court were to find that Framework 42 is not supported by the record, it should leave the regulation in place and decline to adopt Plaintiffs' suggestion that Amendment 13 should be reinstated. Although a court ordinarily would set aside an invalid regulation pending further proceedings before the agency, the court has discretion to "remand for further explanation while leaving the regulation in force." Massachusetts, 170 F.3d at 32. Particularly where, as here, the plaintiffs' challenge goes to only a limited aspect of the regulation, a court should decline to vacate an entire suite of management measures. See Oceana, Inc. v. Evans, 384 F. Supp. 2d 203, 236-37 (D.D.C. 2005) (remanding certain provisions of FMP amendment, finding that "[s]ince these portions are severable from the rest of the FMP, no purpose would be served by the disruptive approach of vacating other parts of the plan"). In light of the harm to the fishery that could result from vacatur of Framework 42, the Court should leave the regulation in place pending any remand.

Vacating Framework 42 would remove protections that NMFS determined were necessary to conserve the resource. See Def. Mem. at 28-29. See also A.R. 7224 (including "management measures that are necessary to achieve the rebuilding fishing mortality rates required by Amendment 13"). Plaintiffs argue that reinstating Amendment 13 would protect fish, pointing to "default measures" in the regulation that may be invoked if rebuilding schedules cannot be met under the standard measures. Pl. Opp. at 5. These default measures, however, are limited in scope, were developed before Framework 42 determined that much more stringent measures than Amendment 13 are needed, and are not as protective as the suite of management measures in Framework 42. See A.R. 8484-8494. Certain default measures have already been

triggered and implemented. In 2006, a reallocation of A, B and C DAS was automatically implemented. See 50 CFR §§ 648.82(d)(1)(ii), (d)(2)(i)(B)(2), (d)(2)(ii)(B)(2). Another Amendment 13 default measure that was scheduled to go into place in 2006 was actually modified by NMFS in an interim action in anticipation of Framework 42. See 71 Fed. Reg. 19348, 19349 (April 13, 2006). The only default measure provided by Amendment 13 which has not already occurred is that set forth at 50 C.F.R. § 648.82(d), pursuant to which the allocations of A, B and C DAS will be adjusted again in 2009. See id. at § 648.82(d)(1)(iii), (d)(2)(i)(B)(3), (d)(2)(ii)(B)(3). Thus, there is nothing in the record, nor any evidence offered by Plaintiffs, to even suggest that the remaining default measure will compensate for the wholesale vacation of Framework 42 measures.

Moreover, the Court should reject Plaintiffs' request that it reinstate Amendment 13 because that regulation has been superseded by Framework 42, and is therefore "defunct." See Gulf of Maine Fishermen's Alliance v. Daley, 292 F.3d 84, 88 (1st Cir. 2002). Plaintiffs rely on Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750 (D.C. Cir. 1987) for the proposition that, when a rule is invalidated, the court should reinstate the rule previously in force. See Pl. Opp. at 4. However, Bowen did not overrule Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983), which recognized that, although there are limited circumstances where vacatur reinstates a prior rule, "the better course is generally to vacate the new rule without reinstating the old rule" in order to "leave[] it to the agency to craft the best replacement for its own rule." Id. at 545. As Plaintiffs note, "the applicability of the rule stated in Small Refiner depends on the specific facts of each case." Pl. Opp. at 4 (citing Oceana, Inc. v. Evans, 389 F. Supp. 2d 4, 7 (D.D.C. 2005)**)**. Here, the Court should decline to reinstate Amendment 13 where

NMFS has concluded that the management measures therein are insufficient to conserve depleted groundfish stocks. See A.R. 8483; A.R. 7224. Plaintiffs cannot reasonably argue that Amendment 13 should be reinstated because it would avoid economic harm to fishermen, see Pl. Opp. at 3, where NMFS has determined that the measures in Amendment 13 will not prevent overfishing. See NRDC v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (if preventing overfishing conflicts with achieving optimum yield ("OY"), preventing overfishing prevails). Even if the Court finds that remand is appropriate, it should exercise its discretion to leave Framework 42 in place to retain these protections that the Council and NMFS concluded were necessary to conserve groundfish stocks.

CONCLUSION

For the foregoing reasons, and those set forth in Federal Defendants' memorandum in support of their cross-motion for summary judgment, the Court should find that Framework 42 is supported by the administrative record and in accordance with applicable law and should grant Federal Defendants' cross-motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF") and paper copies will be sent to those indicated as non registered participants on August 11, 2008.

/s/ Kristen Byrnes Floom